CS DOCKET NO. 02-52

NOTICE OF PROPOSED	**)(**	**BEFORE THE**
RULEMAKING APPROPRIATE	**)(**	
REGULATORY TREATMENT	**)(**	**FEDERAL COMMUNICATIONS**
FOR BROADBAND ACCESS TO THE	**)(**	
INTERNET OVER CABLE FACILITIES	**)(**	**COMMISSION**

COMMENTS OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION

COMES NOW the Texas Municipal League (TML) and the Texas City Attorneys Association (TCAA) and files these comments in regard to the referenced proposal for rulemaking. TML is a non-profit association of over 1060 incorporated Texas cities (out of approximately 1220 in the state) that provides educational services, legal guidance, and legislative support to the more than 13,000 elected officials, city managers, city attorneys, and department heads who are responsible for the governance of those cities. The Texas City Attorneys Association (TCAA) is an affiliate of TML with more than 500 attorney members who represent Texas cities.

TML and TCAA file these comments in support of those filed by the Alliance of Local Organizations Against Preemption, which takes the position that local communities should (1) be able to require cable operators to obtain additional authorizations to use and occupy public rights of way to provide cable services, and to enforce existing authorizations that have been granted for the service; (2) be able to obtain fair and reasonable compensation for use and occupancy of

the public rights of way to provide non-cable services; and (3) should be able to regulate cable companies in their provision of non-cable services, as provided under the Cable Act. Furthermore, TML and TCAA would show the following:

I
City Regulation of Streets and Rights-of-Way Does Not Impede the Deployment of Broadband

The Declaratory Ruling and Notice of Proposed Rulemaking of March 14, 2002 states in part 102 that:

> As the Commission has previously stated, we believe that 'administration of the public rights-of-way should not be used to undermine efforts of either cable or telecommunications providers to upgrade or build new facilities to provide a broad array of new communications services.'[344]. . . . The Commission has previously expressed concern about unnecessary regulation that extends far beyond local government interests in management of the public rights-of-way,[345] and about the discriminatory application of regulation at the state and local levels.[346] We are concerned that state or local regulation beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs on the development of new broadband services. Some commenters have raised questions about potential state and local actions that could restrict entry, impose access or other requirements on cable modem service, or assess fees or taxes on cable internet service.[347] We seek comment on these issues.

Predictably, the commenters referenced in footnote 347 were two cable providers, and the questions they raised, as well as the entire quote, exemplify a gross falsehood that is being foisted off on the American public and particularly on federal and state regulators. The notion that city officials or employees have either the time or inclination to impose "unnecessary regulation that extends far beyond local government interests," or discriminatory application of regulations, or regulations unnecessary for the management of rights-of-way, is laughable. Most city officials and employees are challenged to the find the time and resources necessary to adequately manage existing rights-of-way and street infrastructure. Out of the thousands of

incorporated cities in the United States,[1] it may be possible to find isolated incidents of poor right-of-way management, just as it is possible to find examples of corruption, embezzlement, and incompetence. However, to suggest that most cities, or more than a scattered handful, are intentionally making it unnecessarily difficult or expensive for cable or telecommunication providers to use public rights-of-way for the deployment of broadband is not only wrong, but reckless and dangerous.

Yet that is the message that cable and telecommunication providers are disseminating, the FCC and other regulators are hearing, and the Declaratory Ruling of March 14, 2002 proves that the message is having its desired effect.

Since at least 1996, when the telecommunications industry was deregulated, a campaign has been waged to eliminate or diminish state and local authority over the cable and telecommunications industries. The battleground has been the FCC, Congress, state legislatures, and state utility commissions. The message is that local governments, particularly cities, are the reason that new technology is not reaching Americans more quickly. The message has great appeal to lawmakers and regulators who, on the one hand want to demonstrate their support for the industry and the new technology, and yet are not responsible for local streets and local budgets. It is easy to shift focus away from the real issues, such as the lack of profitability of building facilities in rural areas and whether the services are priced affordably, by focusing blame on local governments.

There is no great mystery why this is occurring. If such providers do not have to obtain permission or a permit to excavate in the streets, do not have to comply with police regulations that protect the safety and welfare of the public, and do not have to pay reasonable compensation

[1] The National League of Cities states that it represents over 18,000 cities through state municipal leagues.

for the use of public lands, they are able to get their product to customers easier and at a larger profit. Increased profits are an entirely acceptable, perhaps even laudable, goal for private business to pursue. It is not acceptable or laudable, however, if the result of that pursuit places public safety or the financial stability of local governments at risk.

The fallacy of the industry's argument is easy to expose. According to the National Cable & Telecommunications Association, as of the end of 2001 over 70 million U.S. households could receive cable modem broadband access if they wanted it.[2] Yet at the same time, the Department of Commerce reported, based on analysis of the 2000 Census, that whereas 60.2 million U.S. households had a personal computer and 53.0 million U.S. households subscribed to the Internet, only 10.6 million U.S. households connected to the internet via broadband.[3] This information reveals three basic facts: that broadband internet access is more widely available over cable modem than over other facilities, that approximately five-sevenths of the public that have access to broadband have decided not to acquire it for reasons other than city regulation of the rights-of-way, and cable providers have been entirely capable of making cable modem service available despite city regulation of the rights-of-way and regardless of the fact that cable modem was treated as a cable service for franchising purposes. If city regulation of the rights-of way is impeding the spread of cable modem, how was the cable industry able to become the leading provider of broadband prior to the Declaratory Ruling of March 14, 2002?

In her separate statement, FCC Commissioner Abernathy wrote that "[w]e must balance the legitimate role of local franchising authorities in managing rights-of-way against the risk that

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www.nlc.org. In Texas there are over 1200 incorporated cities, or which 1065 are members of TML

[2] NCTA, Nov. 15, 2001, cited by Bruce P. Mehlman, Assistant Secretary for Technology Policy, United States Department of Commerce, in opening remarks to the Technology Administration's Workshop on *Understanding Broadband Demand: Digital Content and Rights Management*, Dec. 17, 2001.

excessive regulation will hamper efforts by cable operators to upgrade plants and roll out new broadband services." TML and TCAA agree wholeheartedly. However, stripping cities of financial resources whereby they may manage rights-of-way, may respond to public concerns about cable and cable modem service, as well as financial incentive for cities to attract more providers of cable modem is not balancing. It is ignoring the valid regulatory and financial concerns of local governments in order to promote the profits of private industry.

II
Rules Consistent with the Declaratory Ruling of March 14, 2002 Would Violate Federal and State Law Applicable to Texas Cities

Streets and rights-of-way serve not only as the paths along which the vehicular traffic and goods and services of the nation move, but also as the arteries through which are delivered the necessities and luxuries of modern life and business--water, electricity, gas, telecommunications, internet service, and cable television service. When one considers that street right-of-way is also the passageway for police, fire, ambulance, and emergency services which protect American lives and property, and is the drainage way by which wastewater and stormwater are carried away, it is easy to understand why street right-of-way is sometimes described as the single most valuable category of real estate in the nation.[4]

Texas cities have exclusive control over public highways, streets and alleys within the city, such land being public property and such authority having been delegated to the cities by the state legislature.[5] While this may be a common pattern among states, Texas is unique in its

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[3] The Honorable Steve Wolens, Chair, Texas House of Representatives Committee on State Affairs, Memo dated Feb. 27, 2002 to

[4] Nick Miller, "Telecommunications State League Strategy Session," National League of Cities, Washington, D.C., May 9, 1996.

[5] Tex. Transp. Code §§ 311.001 & 311.002 (Vernon 1999); General Act of 1858; West v. City of Waco, 116 Tex. 472, 294 S.W. 832 (1927); Robbins v. Limestone Co., 114 Tex. 345, 268 S.W. 915 (1925). Texas Local Gov't Code, Ch. 283.

relationship to the United States government with regard to such matters because Texas, unlike other states, was allowed to retain all of its public lands when Texas was annexed into the union.[6] Texas was an independent republic when it agreed to join the United States and land was its principal asset. Accordingly, the Articles of Annexation adopted by Congress on March 1, 1845, specifically allowed Texas to "retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of . . .[the] Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State shall direct."[7]

The Texas Constitution of 1845 created the General Land Office[8] to which was delegated the responsibility for caring for or disposing of much of the state's public lands. Public lands were also delegated to other state agencies and political subdivisions for parks, state highways, county roads, penitentiaries, school lands, universities, the veterans land board, and, of course, city streets and rights-of-way.[9] The Texas Constitution, as amended in 1876, also prohibits the state's cities from lending credit, donating money, or allowing free use of public property solely for the benefit of an individual, corporation, or association.[10]

Accordingly, by ruling that cable modem service is not cable service and that it is not subject to the franchising authority of local governments, the FCC will be asserting its jurisdiction over the use of public property that was specifically reserved by Congress to the

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[6] Articles of Annexation, United State Congress, Joint Resolution of March 1, 1845, Resolution third, 5 U.S. Stat. 797; Vernon's Constitution of the State of Texas Ann., vol. 3, p. 496.

[7] Articles of Annexation, Joint Resolution of March 1, 1845, Resolution second, 5 U.S. Stat. 797; Vernon's Constitution of the State of Texas Annotated, vol. 3, p. 496.

[8] Tex. Const. of 1845, Art. XII.

[9] "Any city or town incorporated under the general laws of this State shall have the exclusive control and power over the streets, alleys, and public grounds and highways of the city or town," Tex. Rev. Civ. Stat. Ann. art. 1016, originally enacted by Acts 1889, p.1. See also art. 1146, art. 1175, and successor statutes, particularly Texas Local Gov't Code, Ch. 283; Tex. Transp. Code, §§311.001-.004, 311.071-.078, and §316.021; City of Fort Worth v. Taylor, 162 Tex. 341, 346 S.W.2d 792 (1961)

legislature of the state of Texas, and will be forcing Texas cities to violate their state constitution by allowing the use public property for free, solely for the benefit of private, commercial companies.

III
Rules Consistent with the Declaratory Ruling of March 14, 2002 Will Leave Cable Modem Service Virtually Unregulated

In his statement dissenting to the Declaratory Ruling, FCC Commissioner Copps stated that:

> The Ruling will force cable modem services into the generally deregulated information services category, subject only to the Commission's ancillary jurisdiction of Title I. I cannot conceive that Congress intended to remove from its statutory framework core communications services such as the one at issue in this proceeding. I cannot imagine that it envisioned its statutory handiwork being made obsolete by a new service offering.
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> But make no mistake – today's decision places these services outside any viable and predictable regulatory framework. First, it concludes that, as a statutory matter, cable modem services are not cable services. Next, it concludes that cable operators providing cable modem services over their own facilities are not offering telecommunications services because subscribers are purchasing only information services.

In Texas, as in many states, cities are the "franchising authority" that shares regulatory authority over cable providers with the FCC. The State of Texas, through its Public Utility Commission, exercises virtually no regulatory authority over cable services. Now, as a result of the Declaratory Ruling of March 14, 2002, it appears that cities will have no further authority over cable modem services.

As has been said many times, "he who ignores history is doomed to repeat it."[11] Legal and historical archives brim with accounts of what can result when private enterprise is allowed unfettered rein. The collapse of the savings and loan industry and tax burdens brought on by competing railroads in the 19th Century are distant examples. California's experience with

[10] Tex. Const. Art. 3, Sec. 52 (Vernon's 2002).

industry-backed electric deregulation and the accounting practices of Enron and WorldCom are not.

IV
Conclusion

In conclusion, TML and TCAA urge the FCC to reconsider the Declaratory Ruling of March 14, 2002 and to re-classify cable modem service as a cable service.

Respectfully submitted,

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[11] Attributed to philosopher George Santayana, 1863-1952.